STRUCTURAL CONCRETE SDN. BHD. & ORS.

v.

WING TIEK HOLDINGS BHD.

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
N.H. CHAN JCA
MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: W-02-472 OF 1995]
15 MAY 1996

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Time limit for filing and service - Rules of the High Court 1980, O. 32 r. 13(2) - When does time start to run under O. 32 r. 13(2) - Whether upon service of unsealed copy of summons - Or upon service of sealed copy of summons - Whether affidavit in reply admissible.*

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Served out of time - Preliminary objection taken - Whether affidavit in reply admissible - Whether curable under O. 2 of Rules of the High Court 1980 - Appropriate exercise of discretion.*

CIVIL PROCEDURE: *Stare decisis - Exercise of judicial discretion - Whether constitutes binding precedent - Whether only authority for the facts of the particular case.*

The instant appeal turned upon the proper construction of O. 32 r. 13(2) of the Rules of the High Court 1980 ('the RHC'). The issue was whether the 14-day period within which an affidavit in reply must be filed and served on the other party should be calculated from the date on which the affidavit intended to be replied to was served, or 14 days from the date of service of the sealed copy of the summons-in-chambers in support of which the affidavit was sworn.

The materials facts were as follows: On 22 December 1994, the defendants filed a summons-in-chambers (together with an affidavit in support which was affirmed on 21 December 1994) to set aside a default judgment that had been obtained by the plaintiff against them. On 27 December 1994, the defendants served an unsealed copy of the summons and a file copy of the affidavit in support on the plaintiff. On 29 December 1994, the defendants served a sealed copy of the summons on the plaintiff. On 11 January 1995, the plaintiff affirmed and served an affidavit in reply on the defendants. Thereafter, on the first return-date of the summons-in-chambers, i.e., 13 February 1995, the defendants took a preliminary objection to the admissibility of the plaintiff's

affidavit in reply on the ground that more than 14 days had elapsed from the date of service of the unsealed copy of the summons and the affidavit in support. The Registrar accepted the plaintiff's explanation for the delay and overruled the defendants' preliminary objection. The defendants appealed and the learned Judge dismissed the appeal with costs - holding that time only began to run from the date of service of the sealed copy of the summons, or, in the alternative, that the plaintiff's one-day delay had not prejudiced the defendants and, thus, the plaintiff's affidavit in reply could be accepted under the curative provisions of O. 2 r. 1(1) of the RHC.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court)

[1] The critical words in O. 32 r. 13(2) of the RHC for the purpose of calculation of time are, "... within 14 days from the date of the filing of the application ... ."

[1b] Accordingly, time under O. 32 r. 13(2) of the RHC runs not from the date on which the application is sealed but from the date on which the application is filed.

[2] The issue of late filing will not be a problem unless the adverse party raises an objection. If he does not do so and takes a step in the action, the non-compliance will be regarded as having been waived. If an objection is taken, the Court will have to take the necessary steps under O. 2 of the RHC. This will call for an exercise of discretion which should be appropriately exercised in the circumstances.

[3] Exercises of judicial discretion are not judicial precedent because they are only authority for the facts of the particular case.

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: D1-22-1286-93]

*[**Bahasa Malaysia** translation of Headnotes]*

PROSEDUR SIVIL: *Afidavit - Afidavit jawapan - Had masa untuk pemfailan dan penyampaian - Kaedah-kaedah Mahkamah Tinggi 1980, A. 32 k. 13(2) - Bilakah masa mulai luput di bawah A. 32 k. 13(2) - Samada setelah pemyampaian salinan saman yang tidak dimeterai - Atau selepas penyampaian salinan saman yang telah dimeterai - Samada afidavit jawapan boleh diterima masuk.*

PROSEDUR SIVIL: *Afidavit - Afidavit jawapan - Disampaikan di luar had masa - Bantahan awal dikemukakan - Samada afidavit jawapan boleh*

diterima masuk - Samada boleh dipulihkan di bawah A. 2 Kaedah-kaedah Mahkamah Tinggi 1980 - Perlaksanaan budibicara dengan wajarnya.

PROSEDUR SIVIL: *Stare decisis - Perlaksanaan budibicara kehakiman - Samada membentuk duluan yang mengikat - Samada hanya merupakan satu-satunya autoriti untuk fakta-fakta kes yang tertentu.*

Rayuan semasa ini berpaling kepada pembentukan wajar A. 32 k. 13(2) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT tersebut'). Isunya adalah samada tempoh selama 14 hari dalam mana sesuatu afidavit jawapan mesti difailkan dan disampaikan kepada pihak yang lain seharusnya dikira daripada tarikh bilamana afidavit yang diniatkan untuk diberikan jawapan itu disampaikan, atau 14 hari daripada tarikh penyampaian salinan saman dalam kamar yang telah dimeterai yang mana bagi menyokongnya afidavit tersebut telah diikrarkan.

Fakta-fakta penting adalah seperti berikut: Pada 22 Disember 1994, defendan-defendan telah memfailkan saman-dalam-kamar (bersama-sama dengan suatu afidavit sokongan yang telah diikrarkan pada 21 Disember 1994) bagi mengenepikan satu penghakiman ingkar yang telah diperolehi oleh plaintif terhadap mereka. Pada 27 Disember 1994, defendan-defendan telah menyampaikan saman yang tidak dimeterikan dan satu salinan fail afidavit sokongan ke atas plaintif. Pada 29 Disember 1994, defendan-defendan telah menyampaikan salinan saman tersebut yang telah dimeteraikan ke atas plaintif. Pada 11 Januari 1995, plaintif telah mengikrarkan dan menyampaikan satu afidavit jawapan ke atas defendan-defendan. Selepas itu, pada hari pengembalian yang pertama bagi saman dalam kamar itu, iaitu pada 13 Februari 1995, defendan telah mengemukakan bantahan awal terhadap keboleh-terimaan afidavit jawapan plaintif atas alasan bahawa tempoh masa selama lebih daripada 14 hari telah luput daripada tarikh penyampaian salinan saman yang tidak dimeterai itu dan afidavit sokongan. Pendaftar telah menerima penjelasan plaintif bagi kelewatan itu dan telah menolak bantahan awal defendan-defendan. Defendan-defendan telah merayu dan Hakim yang bijaksana telah menolak rayuan dengan kos – memutuskan bahawa masa hanya mula luput daripada tarikh penyampaian saman yang telah dimeteraikan, atau, secara alternatifnya, bahawa kelewatan satu hari plaintif telah tidak menjejaskan defendan dan, dengan itu, afidavit jawapan defendan seharusnya diterima di bawah peruntukan-peruntukan A. 2 k. 1(1) KMT tersebut yang mempunyai sifat memulihkan.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Perkataan-perkataan yang kritis dalam A. 32 k. 13(2) KMT bagi tujuan menghitung masa adalah, "... dalam tempoh 14 hari daripada tarikh pemfailan permohonan ..."

[lb] Berikutan itu, masa di bawah A. 32 k. 13(2) KMT tersebut telah mula luput bukannya daripada tarikh bilamana permohonan tersebut dimeteraikan tetapi daripada tarikh apabila permohonan itu difailkan.

[2] Isu pemfailan lewat tidak akan menjadi satu masaalah kecuali pihak yang bertentangan membangkitkan bantahan. Jika beliau tidak melakukan sedemikian dan sebaliknya mengambil langkah dalam tindakan itu, ketidak-patuhan akan dianggapkan sebagai telah diketepikan. Jika sesuatu bantahan dikemukakan, Mahkamah akan mengambil langkah-langkah yang perlu di bawah A. 2 KMT tersebut. Ini akan memerlukan pelaksanaan budibicara yang mana seharusnya dilaksanakan dengan cara yang sempurna dalam keadaan yang sedemikian.

[3] Pelaksanaan-pelaksanaan budibicara kehakiman bukannya merupakan duluan kehakiman kerana ianya adalah hanya autoriti bagi fakta-fakta kes yang tertentu.

[Rayuan dari Mahkamah Tinggi Malaya, Kuala Lumpur; Guaman Sivil No. D1-22-1286-93]

[Editor's note: For a recent case on the filing and service of affidavits and O. 32 r. 13(2) of the RHC, see Perbadanan Nasional Insurans Sdn. Bhd. v. Pua Lai Ong [1996] 3 CLJ 321.]

Cases referred to:
Pua Lai Ong v. Perbadanan Nasional Insurans Sdn. Bhd. [1996] 2 CLJ 283 ***(dist)***
PB Securities Sdn. Bhd v. Abdul Rashid bin Mohamed [1994] 3 CLJ 209 ***(aff)***
Malayan Banking Bhd. v. Lim Tee Yong & Others [1994] 3 MLJ 715 ***(refd)***

Legislation referred:
Rules of the High Court 1980, O. 2 r. 1(1), O. 32 rr. 2(1), 13(2)

For the appellant/defendants - C.L. Chin; M/s. Chin & Partners
For the respondent/plaintiff - S.E. Wong; M/s. Fatimah, Kei & Leong

JUDGMENT

Mahadev Shankar JCA:

This appeal turns upon the proper construction of O. 32 r. 13(2) of the Rules of the High Court 1980. The issue is whether the 14-day period within which an affidavit in reply must be filed and served on the other party should be computed from the date on which the affidavit intended to be replied to was served or 14 days from the date of the service of the sealed copy of the summons-in-chambers in support of which the affidavit was sworn. There are conflicting High Court opinions on this matter.

This writ of summons and statement of claim was filed on 10 December 1995. The claim was for goods sold and delivered by the plaintiff to the first defendant. The second, third and fourth defendants were guarantors. On 26 August 1994 the plaintiff obtained a judgment in default of appearance against the first and the second defendants. The judgment was then extracted and on 9 November 1994 the plaintiff served the default judgment on the first and second defendants.

On 22 December 1994 the first and second defendants filed a summons-in-chambers to set aside the default judgment. Together with the summons the first and second defendants filed an affidavit in support which had been affirmed on 21 December 1994.

As usual, it took some time for the first and second defendants to get a sealed copy of the summons-in-chambers from the Registry. The date of hearing of the summons-in-chambers was endorsed therein when the summons was sealed.

On 27 December 1994 the defendants' solicitors served upon the plaintiff's solicitors an unsealed copy of the summons-in-chambers and a file copy of the affidavit in support. On 29 of December 1994 the defendants served a sealed copy of the summons-in-chambers.

Thereafter on 11 January 1995 the plaintiff affirmed an affidavit in reply to the defendants' supporting affidavit and served it the same day upon the defendants' solicitors.

The first return date of the summons-in-chambers was 13 February 1995. On that day the defendants took a preliminary objection to the admissibility of the plaintiff's affidavit in reply. The ground for this preliminary objection was that more than 14 days had elapsed from the date of the unsealed copy of the summons-in-chambers and the affidavit in support (i.e. 27 December 1994) to the date on which the plaintiff's affidavit in reply was filed and served i.e. 11 January 1995. It is to be noted that upon this calculation the 14-day period would have expired on 10 January 1995. Accordingly the delay, if there was one, was only for one day.

On the other hand, if the period had been computed from the date of the service of the sealed copy of the summons-in-chambers i.e. 29 December 1994 then the affidavit in reply would have been served within time.

The Registrar directed the plaintiff to file a further affidavit to explain why the delay had occurred and accordingly the plaintiff's solicitors filed a further affidavit on 4 May 1995 in which it was explained that the plaintiff had misplaced a document upon which they wished to rely, that this was found on 10 January 1995 and therefore the affidavit in reply had been affirmed and filed on 11 January 1995.

The Registrar accepted this explanation and on 16 May 1995 overruled the preliminary objection.

It is not clear whether the Deputy Registrar then proceeded to deal with the application on the merits. What we know is that the defendants immediately appealed to the Judge against the dismissal of the preliminary objection. The Judge dismissed the appeal on 10 July 1995 with costs. Against this dismissal the first and second defendants have appealed to this Court.

The Judge in the Court below held, following the decision in *Pua Lai Ong v. Perbadanan Nasional Insurans Sdn. Bhd.* [1996] 2 CLJ 283; [1995] 3 MLJ 175 that time only began to run from the date of the sealed copy of the summons-in-chambers. The rationale for that decision was based on the effect of O. 32 r. 2(l) of the Rules of the High Court 1980 whereby the issue of a summons by which an application in chambers is to be made takes place on its being sealed by an officer of the Registry. In other words, until the summons is sealed it cannot be said that there is an application pending. In the alternative the Judge in the Court below held that the delay of one day had not prejudiced the defendants and that the Court could therefore accept the affidavit under the curative provisions of O. 2 r. 1(1) of the Rules of the High Court 1980.

The object of O. 32 r. 13(2) was set out by Richard Tallala J in *PB Securities Sdn. Bhd v. Abdul Rashid bin Mohamed* [1994] 3 CLJ 209 at p. 212; [1994] 3 MLJ 168 at p. 174 where he said this:

> As I understand it r. 13 originally stood as it now does in sub-rule 1 thereof. Rule 13(2) which was introduced by amendment which came into effect on 1 August 1993 was effected to bring order to disorder created in the hearing of applications in chambers by parties filing affidavits at the 11th hour thus causing surprise and necessitating time for consideration of the same and reply by affidavit resulting in the application in question having to be adjourned repeatedly and so causing delay, wastage of judicial time and costs. I do not reckon that the Rules Committee in introducing r. 13(2) intended that its provisions should apply to the well-entrenched and I would say more stringent procedure applicable to O. 14.

We would respectfully adopt these observations.

However, we would like to add that the critical words in O. 32 r. 13(2) for the purposes of computation of time are, **"within 14 days from the date *of the filing* of the application;"**

Accordingly time is to run not from the date on which the application is sealed but the date on which the application is filed. Consequently we are unable to agree with this part of the judgment of the learned Judge in the Court below

and in the case of *Pua Lai Ong* earlier referred to. The object of the exercise there is to give the adverse party notice as soon as possible without reference to the eventual date when the application would be sealed in the Registry. By the time that event took place it was envisaged that the affidavit in support of the application would already be in place and the Registry would therefore be in a better position to allot the return date on which the application should be heard.

It is to be noted that the issue of late filing will not be a problem unless the adverse party raises an objection. If he does not do so and takes a step in the action, the non-compliance will be regarded as having been waived. If an objection is taken, the Court will have to take the necessary steps under O. 2. This will call for an exercise of discretion which should be appropriately exercised in the circumstances. *Malayan Banking Bhd. v. Lim Tee Yong & Others* [1994] 3 MLJ 715 is an instance where after objection was taken the Court rejected an affidavit in reply which had been filed after a delay of 2½ months.

Exercises of judicial discretion are not judicial precedent because they are only authority for the facts of the particular case.

In the particular matter before us, we regret that defendants' solicitors thought fit to carry their objection as far as they have done. By so doing, they may have gained their clients time. It is very doubtful if they have served the ends of justice.

We hope that to some extent the plaintiff will be compensated by the costs which we have ordered the defendants to pay both in this Court and in the High Court and before the Deputy Registrar.

Reported by Gan Peng Chiang